

FILED _____

AT _____ O'Clock _____ M
CLERK OF DISTRICT COURT

Deputy

**IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
STATE OF IDAHO IN AND FOR THE COUNTY OF KOOTENAI**

BARBARA SMITH,)
)
 Appellant,)
)
 vs.)
)
 IDAHO STATE LIQUOR DIVISION.)
)
 Respondent.)
 _____)

Case No. **CV 2010 415**
**MEMORANDUM DECISION AND
ORDER ON ADMINISTRATIVE
APPEAL**

Attorneys:

For the Appellant - Barbara Smith (*pro se*)
For the Respondent - Kent Bailey

I. PROCEDURAL HISTORY AND BACKGROUND.

Plaintiff Barbara Smith (Smith) was employed by Defendant Idaho State Liquor Division (ISLD) as a liquor store clerk. ISLD Notice of Contemplated Action, p. 1. On October 8, 2009, ISLD sent Smith a Notice of Contemplated Action regarding her work performance (absenteeism, poor attitude, etc.) and the potential disciplinary actions that could be taken against her. *Id.* The Notice stated Smith could respond to the allegations by 5:00 pm on October 19, 2009. *Id.*, p. 4. Smith sent in her response on October 14, 2009. Opportunity to Respond (from Barbara Smith to James Nally), p. 1. On October 26, 2009, ISLD sent Smith a letter notifying her of her dismissal from classified employment. Exhibit A., p. 1. This letter stated that Smith had “thirty-five calendar days from the date of this letter to exercise the right to contact the State Division of Human Resources in regard to an appeal of this disciplinary action.” *Id.*, p.

3. The letter was delivered on October 27, 2009. FedEx Report (Detailed Results), p. 1. Smith sent an appeal by mail on December 1, 2009, which was received and filed by the Idaho Personnel Commission (IPC) on December 2, 2009. Exhibit 2, p. 1. Because the date of filing was past the thirty-five day period, Smith's appeal was dismissed pursuant to DHR Rule 201.04 on December 8, 2009. Exhibit 3, p. 1-2.

On January 19, 2010, Smith appealed this dismissal to this Court. Exhibit 4, p. 1. Smith's "Memorandum in Support of Administrative Appeal" was filed on April 19, 2010, ISLD's "Response to Appellant's Memorandum in Support of Administrative Appeal" was filed on May 17, 2010, and Smith's "Reply Brief to Respondent's Response" was filed on June 7, 2010. Oral argument was held on July 22, 2010.

Smith requests this Court remand the case to IPC for reconsideration, stating that she did not find the ISLD letter on her porch until October 28, 2009, and did not start the thirty-five day count until October 29, 2009. Memorandum in Support of Administrative Appeal, p. 1.

II. ANALYSIS.

Appeals under I.C. 67-5316 include any classified employee subject to a disciplinary dismissal and who has completed the departmental due process procedure. I.C. 67-5316(1)(a). Such an appeal must be filed within thirty-five days after completion of the due process procedure. I.C. 67-5316(2). Completion of the due process procedure is accomplished by personal delivery or deposit in the United States mail, postage prepaid, of a written notification to the employee of the agency's decision. DHR Rule 201.03. An employee's appeal is timely if received at the Commission's office within thirty-five calendar days after completion of that due process procedure. *Id.* Appeals not filed timely are considered outside of the agency's jurisdiction, which may

be dismissed without motion. DHR Rule 201.04. Such a dismissal decision is final for the Commission. *Id.*

A final decision may be appealed to the District Court provided such appeal is filed to the District Court within forty-two days of the filing of the final decision. I.C. 67-5317(3). The District Court may remand only upon three grounds: 1) that the findings of fact are not based on any substantial, competent evidence, 2) that the commission has acted without jurisdiction or in excess of its powers, or 3) that the findings of fact by the commission do not as a matter of law support the decision. I.C. 67-5318.

Administrative authorities are tribunals whose limited jurisdiction is entirely dependent on the statutes that give them power. *Washington Water Power Co. v. Kootenai Environmental Alliance*, 99 Idaho 875, 879, 591 P.2d 122, 126 (1979). Though these tribunals may determine whether they have such power, they cannot confer any power upon themselves. *Id.* No jurisdiction exists if the statutory provisions are not met, and nothing is presumed in favor of an administrative authority's jurisdiction. *Id.*

An argument regarding an untimely appeal must be made before bringing it on appeal. *Obenchain v. McAlvain Construction, Inc.*, 143 Idaho 56, 57, 137 P.3d 443, 444 (2006). In *Obenchain*, the employee appealed to the Idaho Industrial Commission regarding the decision to deny his unemployment benefits. *Id.* The employee was told he had fourteen days to appeal the decision but when he sent the appeal, it was postmarked one day after the allotted period. *Id.* As a result, the appeal was dismissed, and as the Commission found that the employee failed to provide legal justification for the untimely appeal, reconsideration was denied. *Id.* On appeal to the Idaho Supreme Court, the employee was prevented from making the argument that the letter was postmarked incorrectly because the employee had not made that argument

prior. *Id.* The Supreme Court went on to state that appellate court review is “limited to the evidence, theories and arguments that were presented . . . below.” *State v. Vierra*, 125 Idaho 465, 469, 872 P.2d 728, 731 (Ct.App. 1994). As a result, arguments raised for the first time on appeal will not be considered. *Obenchain*, 143, Idaho 57.

In the present case, Smith was a classified employee for the ISLD who was disciplinarily dismissed and therefore, was allowed an appeal to the IPC under I.C. 67-5316. The ISLD sent a letter of dismissal to Smith on October 26, 2009, by depositing it in the mail via FedEx on that day. Such a deposit is sufficient to complete the due process procedure required under DHR 210.03. The letter itself informed Smith that she had thirty-five days from the date of that letter (October 26, 2009) to appeal the dismissal decision. Even if Smith did not actually “receive” the package until October 28, 2009, the thirty-five day clock does not start running at the time Smith received the letter, but at the time it was sent (as stated in the letter), according DHR 210.03. This rule also requires that in order to be timely, the letter must be *received* at the office within thirty-five days, not sent, and Smith’s letter was not received at the office until December 2, 2009. As a result, the appeal was untimely and therefore, outside of the IPC’s jurisdiction. The appeal was subsequently appropriately dismissed.

The IPC is an administrative authority, and so is a court of limited jurisdiction. Therefore; their authority is limited to the statutory authority granted to them, in this case, I.C. 67-5316. This case falls outside of the IPC’s jurisdiction because Smith failed to follow the procedural rules in DHR 210.03 by not filing her appeal timely. As a result, her case was dismissed and that decision is final, as outlined in *Washington Water Power*.

Furthermore, this case is very similar to *Obenchain*, as both are cases in which

the employee failed to file their appeal timely and as a result, their appeals were dismissed by the respective administrative authorities. The Supreme Court in that case held that because there was not legal justification for the untimely appeal at the time of dismissal, and the arguments made were not preserved for appeal, the Commission's dismissal was affirmed. As in that case, any arguments brought to this Court that were not preserved for appeal at the IPC's level cannot not be heard.

The Court looks at the grounds stated in I.C. 67-6318 when making a decision: 1) whether the findings of fact are based on any substantial, competent evidence, 2) whether the commission has acted without jurisdiction or in excess of its powers, or 3) whether the findings of fact by the commission do not as a matter of law support the decision. The issue of jurisdiction has been addressed above and furthermore, had the IPC not dismissed the case, they would have been acting outside of its jurisdiction and in excess of its powers, as shown in DHR 210.04 and *Washington Water Power*. Regarding whether the findings of fact are based on substantial evidence and whether the findings of fact do not support the decision as a matter of law, the arguments made to this Court must be the same as those made prior to this appeal, as stated above.

III. CONCLUSION AND ORDER.

For the reasons stated above, dismissal of the appellant's appeal to the IPC must be affirmed.

IT IS HEREBY ORDERED the dismissal of appellant Smith's appeal to the IPC is AFFIRMED.

Entered this 26th day of July, 2010.

John T. Mitchell, District Judge

Certificate of Service

I certify that on the _____ day of July, 2010, a true copy of the foregoing was mailed postage prepaid or was sent by interoffice mail or facsimile to each of the following:

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